(5)

Number 84-718

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT L. MENDENHALL, Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

From the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S QUESTION

Whether the courts below correctly refused to overturn the agency's prior finding that, as of July 23, 1955, petitioner's sand and gravel mining claims were not supported by the "discovery" of a valuable mineral deposit as required by the Mining Law of 1872, 30 U.S.C. 22.

PETITIONER'S REPLY

The courts below erred when they refused to overturn the agency's prior finding of invalidity of Petitioner's mining claim and thereby misapplied the law in that:

(a) The enactment of the Surface Resources Act on July 23, 1955 did not change the right of a citizen to locate a mining claim for sand and gravel, etc. in good faith.

(b) Mineral discovery sufficient to validate a mining claim need not be a marketable mineral deposit as of any date.

(c) Respondent in its Brief in Opposition to the Petition for writ of certiorari argues the propriety of Petitioner's writ rather than the substance of the legal issue.

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STATEMENT SUPPORTING PETITIONER'S REPLY

(a) The enactment of the Surface Resources Act on July 23, 1955, did not change the right of a citizen to locate a mining claim for sand and gravel, etc. in good faith.

On June 28, 1966 a Hearing was held before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs. The record

of that hearing, excerpted in the Appendix to the Amicus Curiae filed in support of Mendenhall's Petition, clearly expresses the idea that the Surface Resources Act does not change the rights of bona fide mineral entrymen to locate mining claims. There are no statements in the record contrary to this interpretation.

Senator Gruening (Amicus App. 42):

> . . . "In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States . . ."

Senator Cannon, (Amicus App. 44 & 45):

> . . . The Department of Interior has consistantly held in recent years that all sand and gravel and similar deposits are of a common variety. . .
>
> . . . the adoption of this position by the Interior Department, in my opinion, clearly ignores the intent of Congress at the time it passed Public Law 167. . .

Senator Metcalf (Amicus App. 61):

> Not only did we intend to, but we admonished both the Secretaries of Agriculture and Interior that we intended to carry out the traditional intent of the mining law.

Also see the testimony of Senator Moss (Amicus App. 50) and Senator Bible (Amicus App. 67).

(b Mineral discovery sufficient to validate a mining claim need not be a marketable mineral deposit as of any date.

No court has ever held that in order to entitle a citizen to locate a mining claim, ore of commercial value, in either quantity or quality, must be discovered. Such a theory would make most mining locations impossible: Lindley on Mines, Section 336. See Book v. Justice Mining Company, 1893, 58 Fed. 106; East Titanic Consolidated Mining Claim, 40 L.D. 271; Jefferson-Montana Copper Mines Company, 41 L.D. 320; U.S. v. Mobley, 45 F.Supp. 407; Nevada Sierra Oil Co. v. Home Oil Co., (1899), 98 Fed. 673; Madison v. Octave Oil Co., 99 Pac. 176; U .S. v. M.W. Mouat et al. (1954) 61 I.D. 289; Ohio Oil Co., A-26479 (1953).

Neither is it required that the deposits of mineral shall be sufficiently extensive to pay operating expense, in order to locate and maintain a valid placer claim: Murray v. White, 1911, 113 Pac. 754. And it does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no commercial value. Narver v. Eastman, 34 L.D. 123.

What are the requirements of a valid discovery? In the case of Book v. Justice Mining Company, supra, the cost of removal of porphyry copper was testified to at length by experts in an attempt by Book to show that Justice Mining Company could not remove and market the ore at a profit. The Court held the discovery valid and explained with the hypothetical case below.

> A vein or lode of quartz or other rock in place bearing gold and silver is found upon the side of a hill or mountain. It

is within well defined walls, and the rock assays from $1 to $15 per ton. The cost of extracting, removing, and milling the ore is $20 per ton. The miner making the discovery is aware of this fact; but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, the provisions of the mining laws, that a person making the discovery -- a discovery which in good faith, induces him to locate the vein or lode, and commence the running of a tunnel into a hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same -- can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went up the hill 500 or 1000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and then by sinking a deeper shaft upon the same lode, found ore which assayed over $40 per ton, -- enough to ensure a profit to the owners, -- and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for according to the testimony of several of complaintant's witnesses the latter location would be valid and a prior location invalid. The Act of Congress is susceptible of no such construction. It does not impose any conditions as to the

value or the extent of the ore. It simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

The Respondent's "marketability test" is a bag of tricks from which agencies administering federal lands have drawn to persecute and eliminate small miners and free enterprise from the public domain. The elements effecting a market are infinite in number and by carefully choosing a limited set of market factors, it is possible to prove that anything is not marketable. Respondent's use of this magical test has defeated the spirit of the mining statutes and the construction given them by the courts. Under Respondent's administration of the laws since the passage of the Surface Resources Act of 1955, a prospector must find a paying mine before he can locate his claim; thus, the "marketability test" has paralyzed mining

in the western United States. Yet, the act of 1955 was not intended to affect in any way the laws governing mining claims located prior to 1955, and those located after the passage of the act are affected only in so far as that Act provides for the limitation of a mining claimant's surface rights.

In view of the fact that the charges against Petitioner's predecessor, Sullivan, were brought upon the recommendation of Government mineral examiners who believed that evidence of a commercial operation on the claims prior to July 23, 1955, was necessary to validation; and the fact that the Respondent held the claims invalid because Sullivan did not show that the deposit could be extracted, removed and marketed at a profit; it is apparent that the true test of a discovery necessary for the validation of a mining claim - the "prudent man" test as enunciated in Castle

v. Womble, 19 Pub. Lands Dec. 455) and approved in the Chrisman v. Miller, 197 U.S. 313; Cameron v. United States, 252 U.S. 456; Rawls v. U.S., 566 F.2d 1373, (9th Cir. 1978); Baker v. U.S., 613 F.2d 224 (9th Cir.), cert. den. 449 U.S. 932 (1980); and U.S. v. Coleman, 394 U.S. 907 was not applied.

In so far as the cases above support Departmental requirements of marketability, they are in error. The continuing application of this incorrect rule, which is patently prejudicial, requires the relief sought by bona fide miners as a matter of law.

(c) Respondent in its brief in opposition argues the propriety of Petitioner's writ rather than the substantive legal issue.

In the Brief in Opposition, Respondent misrepresents the facts by relying totally

on the Hearing Examiner's opinion rather than the factual evidence submitted at the Bureau of Land Management (BLM) hearing. The Court is most likely left with the impression after reading Respondent's brief, that the mining claims in question are of peripheral value or valueless and that Sullivan, Mendenhall's predecessor on the claims, presented no evidence of a valuable mineral deposit at the Bureau of Land Management hearing. Therefore, presentation of the transcript cannot wait to be forwarded with the record upon the Court's granting writ of certiorari. It's length not being prohibitive, the transcript of U.S. v. Sullivan is reproduced as an appendix to this reply.

To briefly correct Respondent's Statement, we refer the court to the appendix for correction of the facts listed below. Petitioner believes that the scope of these errors clearly indicates that the BLM

Hearing Examiner is not the independent, quasi-judicial officer required by the Administrative Procedure Act, but rather an advocate himself for Respondent's policy of nullifying the mining laws:

(1.) Nowhere did Sullivan "stipulate" (Statement, page 2) that the limestone aggregate on his mining claims was a "common variety". On the contrary, he testified that it was of uncommon value: Appendix 78-79. Furthermore, the term "sand and gravel" is a loosely used term which can be of no legal significance. See Appendix (App.) 27-31, 81, 90.

(2.) In the absence of any higher purpose for the contested property (App. 35), evidence on record supports the fact that the limestone aggregate (generally called "sand and gravel" in the hearing) had been mined from the area of the claims prior and during Sullivan's ownership of the claims: App. 10, 26, 78-79, 82, 86.

(3.) Contrary to the Brief in Opposition (pages 7-8), a portion of the limestone aggregate deposit being mined by Petitioner overlaps onto Charlestone Stone Company's patented claims: App. 68, then 58, 63, 76, 83, 85, 88.

(4.) The Hearing Examiner's denial of any removals of mineral from the claims (Pet. App. 38) takes no cognizance of the probability that evidence of mining is erased in the deltas at the mouth desert canyons: App. 66-67, 72-74, 81, 88-99, 104.

(5.) The aerial photograph presented at the hearing does not support the conclusion that no mining had taken place on the property: App. 61, 66-67.

(6.) The Hearing Examiner relies upon the mineral examiner's legal opinion as to marketability even though that opinion (App 45) does not address the market criteria to which Sullivan testified (App. 99) and which eventually proved important to the present mining operation: App. 45, 99.

In light of the many questionable representations of fact in the Hearing Examiner's decision, it is clear that the evidence has never been heard by an impartial quasi-judicial body. Nor has the evidence been reviewed by a court unconstrained by the unjustified acceptance of the discretion of an agency which has defeated the stated purpose of the mining laws.

In addition many of the procedural cases which Respondent uses in its opposition to the petition are immaterial. U.S. v. L.A. Tucker Truck Lines, Inc. (Tucker), 344 U.S. 33, 37 (1952) does not forbid Petitioner from raising the substantial evidence question before this Court. The administrative hearing appealed from in Tucker, supra, was initiated as the result of an application by Tucker and procedural limitations were implicit to that application. The contest against Petitioner's

mining claims originated from no instrument of Petitioner himself, such as an application for patent, but from Respondent's policy of invalidating all mining claims in an area with the goal of leasing the mineral (Amicus App. 72-73).

Respondent policy in the administration of the Surface Varieties Act has been "fraudulent, arbitrary, capricious" and "so grossly erroneous as necessarily to imply bad faith", Crown Coat Front Co. v. U.S. 386 U.S. 503, 18 L ed 2d 256, at 256. The statutory limitation imposed in Crown Coat, supra, to the Court's right to review administrative decisions is immaterial. Furthermore, in Coleman v. U.S., Ninth Cir. Ct., 390 U.S. 599 (1968) and in Webb v. U.S., Ninth Cir.Ct., No. 79-3484, the courts have ruled that there could be no limitation to the time allowed for an appeal to the Courts from an invalidation of a mining claim by Interior Department.

In D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission (Washington Metro), 466 F.2d 394, 404 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972), the Court ruled that "an essential ingredient of the aggrievement standard is adversity flowing from the order sought to be reviewed". The Court was satisfied on the District Court level that no adversity whatsoever was wrought to petitioner therein, Diana K. Powell. Powell, who inaugurated the case, opposed an increase in transit fares and urged lowering of existing fares at a preceeding before the Washington Metropolitan Area Transit Commission upon an application by D.C. Transit System, Inc. The Court held that "decisions by the administrative fact finder based on credibility determinations should not be upset by a reviewing court except when made irrationally." Mendenhall's adversity does flow from the

decision of the BLM Hearing Examiner, but that decision made no "credibility determinations" as to the mining claimant's good faith. That decision skirted the credibility issue with the bogus issue of whether the mineral deposit was marketable.

As in Crown Coat and in Washington Metro supra, Respondent's use of Goldberg v. Kelly, 397 U.S. 254, 270 (1970) is equally oblivious to the substantial differences between the claim against the Government in the cited cases and a mining claimant. In Goldberg v. Kelly the termination of welfare payments was being contested. The District Court held that only a pre-termination evidentiary hearing would satisfy due process requirements. This Court would not allow such an interpretaton of due process and ruled that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while

it has opportunity for correction, in order to raise issues reviewable by the courts."

For Respondent to compare welfare termination and its administration by Secretary Goldberg to the invalidation of a mining claim made in good faith is preposterous. Petitioner and his predecessor, Sullivan, have made substantial investments in the mining claims which Respondent wishes to seize, investments (Appendix 5, 36, 70, 72-76, 81, 89) which are protected and encouraged under the property right provisions of the mining laws. Furthermore, unlike welfare termination, hearings are procedurally required in cases of mining claim invalidation, U.S. v. Keith O'Leary, et al., 63 L.D. 341 (1956).

Respondent's insistance that the Courts are not allowed to "reweigh" the facts and that due process has been accomplished by the invalidaton hearing before a BLM Hearing Examiner is patently

absurd, particularly because, unlike criminal prosecution, the Respondent is not barred from appealing decisions in favor of the mining claimant.

In U.S. v. Haskins, (59 IBLA 1(1981), on December 30, 1984, in CV-82-M, fifty years of government attempts to invalidate Haskins' rock quarry came to an end. The District Court affirmed the IBLA decision in U.S. v. Haskins, supra, to overturn the administrative law judge who ruled for Haskins on the facts in CA 2755. Haskins could not afford to appeal. The Government had broken the back of another small miner.

The last round of the Haskins defense began in 1972, when the Forest Service filed a complaint in ejectment in the federal district court charging that Haskins was producing placer mineral from an invalidated lode mining claim. The court refused to force Haskins to vacate his mining claims and ordered the

Department to hear the facts of Haskins' placer mineral discovery. The U.S. Attorney motioned immediately for a re-hearing. Again the court directed the Forest Service to hear evidence of a placer discovery, this time in a memorandum opinion No. CV 72-246-JWC (May 18, 1972). The Forest Service appealed to the Ninth Circuit, but that court affirmed the District Court in U.S. vs. Haskins, 505 F.2d 246 (1974). The Ninth Circuit ordered the Bureau of Land Management to hear Haskins' evidence with regard to a valuable mineral deposit on the Haskins Quarry Placer Mining Claim.

Thereafter, the BLM's Administrative Law Judge (ALJ), CA 2755 found the Haskins Quarry placer mining claim to be valid and the IBLA called the ALJ's opinion only "advisory" and in a review de novo found their own facts, none of which were based on testimony at the ALJ's hearing. On

appeal the Federal District Court refused to tamper with agency discretion.

In the case now before the Court, Sullivan's appealed the decision of the Hearing Examiner to the IBLA. In that appeal, Sullivan focused on the idea that he had not been represented by legal counsel at the hearing. At the hearing, he had preferred to have an engineer represent and defend the mining claims, presumably believing that the expertise necessary for such a presentation was not legal in nature. Only after the BLM Hearing Examiner submitted his decision, did Sullivan understand that legal opinions of the government's mineral examiner (Appendix 34, 41-42, 46-48) were the crux of what the Interior Department and the courts below have called "substantial evidence." (See Pet. App. 28.)

Sullivan had not hired in his defense anyone to declare that his deposit was not

a "common variety" nor to declare that he was a "prudent man". The BLM mineral examiner's legal opinion on these two matters has defeated all Sullivan's evidence of a bona fides in development on the claims.

CONCLUSION

Nothing in Respondent's Brief in Opposition is of substance necessary to deter the Court from granting Petitioner a writ of certiorari.

Hale C Tognoni

Respectfully submitted,
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Counsel for Petitioner

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OCTOBER TERM, 1984

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vs.	)	No. 84-718
United States of America, et al.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served, below, have been served copies of the PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION by mail on January 23, 1985:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

The Department of the Interior
Land and Natural Resources Division
Appellate Section
Attn: Wendy B. Jacobs, Attorney
18th and C. Streets, N.W.
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Hale C. Tognoni

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STATE OF ARIZONA)
) ss.
County of Maricopa)

Subcribed and sworn to before me

this 23rd day of January, 1985.

Notary Public

My Commission Expires: FEB 28 1986